BEN R. WILLIAMS

IBLA 81-583 Decided August 5, 1981

Appeal from the decision of the Arizona State Office, Bureau of Land Management, rejecting patent amendment application Phoenix 0177.

Affirmed.

1. Conveyances: Generally -- Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents -- Patents of Public Lands: Amendments

Under sec. 316 of the Federal Land Policy and Management Act of 1976, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. BLM's rejection of an application to amend a homestead patent to change the legal description of the land patented will be affirmed where the record does not support a finding that the entryman erred in describing the lands he had entered.

APPEARANCES: Ben R. Williams, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On September 7, 1979, Ben R. and Faith R. Williams filed application to amend patent No. 774666 which had originally issued on September 24, 1920, to George Washington Bailey for homestead entry Phoenix 0177. The patent as issued recited the conveyance of the following 60 acres of land in the Sitgreaves National Forest:

T. 11 N., R. 18 E., Gila and Salt River meridian, Arizona
sec. 22, S 1/2 NW 1/4 SE 1/4
N 1/2 N 1/2 SW 1/4 SE 1/4
S 1/2 NE 1/4 SW 1/4
N 1/2 N 1/2 SE 1/4 SW 1/4

The Williams had acquired the patented lands from one W. R. Pope who had apparently purchased the homestead from the Bailey estate. In their patent amendment application they urged that the original legal description of the lands should have been:

T. 11 N., R. 18 E., Gila and Salt River meridian, Arizona
sec. 22: S 1/2 SW 1/4 NW 1/4 SE 1/4
SW 1/4 SE 1/4 NW 1/4 SE 1/4
W 1/2 SE 1/4 SE 1/4 NW 1/4 SE 1/4
S 1/2 S 1/2 NE 1/4 SW 1/4
E 1/2 SE 1/4 SE 1/4 NW 1/4 SW 1/4
E 1/2 E 1/2 NE 1/4 SW 1/4 SW 1/4
N 1/2 SE 1/4 SW 1/4
NW 1/4 SW 1/4 SE 1/4
W 1/2 NE 1/4 SW 1/4 SE 1/4
W 1/2 E 1/2 NE 1/4 SW 1/4 SE 1/4.

They asserted that the lands described in the patent are considerably different from the lands actually occupied and cultivated by Bailey and later by Pope. They also urged that the corner markers used to sell the land to them were the original homestead markers. The Bureau of Land Management (BLM) rejected the Williams' application on August 5, 1980, stating that the assertions in the application were not supported by substantial evidence and that there was a unique pueblo ruin of historical value on the land sought by the Williams. On appeal Ben Williams requested leave to insert another description for the lands which he stated would more accurately describe the lands settled by Bailey. The new land description reads as follows:

A PARCEL OF LAND

Situated in Section 22, Township 11 North,
Range 18 East, G & S. R. B. & M., Arizona

Beginning at the SW corner, NE1/4, SE1/4, NE1/4, SW1/4,
SW1/4, of said Section 22 and the TRUE POINT OF BEGINNING;
THENCE Easterly to the NE corner, SE1/4, SE1/4, NE1/4,
SE1/4, SW1/4, of Section 22;
THENCE Easterly to the NE corner, SW1/4, SE1/4, NE1/4,
SW1/4, SE1/4, of said Section 22;
THENCE Northerly to the NE corner, SW1/4, NE1/4, SE1/4,
NW1/4, SE1/4, of said section 22;
THENCE Westerly to the NE corner, SE1/4, NE1/4, SE1/4,
NE1/4, SW1/4, of said Section 22;
THENCE Westerly to the NW corner, SE1/4, NE1/4, SE1/4,
NW1/4, SW1/4, of said Section 22,
THENCE Southerly to the TRUE POINT OF BEGINNING. [1/]

1/ As noted in the BLM decision on appeal herein, appellants' proposed legal description is incorrect because of the commas inserted after each aliquot part. However, the Board, as did BLM, has assumed that appellants intended the same description without commas between the aliquot parts.

In his statement of reasons, appellant argued that a recent dependent resurvey of sec. 22, T. 11 N., R. 18 E., Gila and Salt River meridian, Arizona, ignores what he alleges is the one remaining original homestead corner marker. This marker places the southeast corner of the homestead approximately 165 feet south and 165 feet west of the dependent resurvey brass cap purporting to indicate the southeast corner. He urged that more credence should be given to the alleged original homestead corner marker because it is not known whether a professional surveyor aided Bailey in marking his homestead boundaries. He noted that earlier doubt was raised as to the correct location of the homestead when the administrator of Bailey's estate inquired of BLM as to a discrepancy between the lands entered and the lands patented.

Appellant argued further that "the most compelling reason for believing that the land described in the original patent and the land intended to be homesteaded by George Bailey are different is the land itself." He asserted that, based on the dependent resurvey, the patented lands contain approximately 30 acres of gravelly ridges, leaving only 30 cultivable acres, whereas the original field report submitted prior to the patent's issuance described the lands as containing only 5-10 acres of gravelly ridge. He submitted statements of several individuals familiar with the lands at issue who state that Bailey used and cultivated about 50 acres of meadowlands south of the ridge as his own. Appellant also reported that under the dependent resurvey the west boundary of the patented lands runs across the bank of a small stock pond and argues that it is unlikely that Bailey would have located the stock pond so close to the exterior boundary of his homestead tract.

Appellant gave great weight to the fact that both Bailey and Pope held special land use permits for pasture and cultivation of acreage adjoining the Bailey lands but Pope's permit encompassed a greater area. He suggested that the difference is a reflection of Bailey's belief that he held lands different from those actually described in the patent. He also referred to a section map on which he has plotted the boundaries of the patented lands, according to the dependent resurvey and his requested correction, and the fence marking the outside of the special use permit lands. His map places a portion of the fence within the boundaries of the patented lands according to the dependent resurvey.

Appellant concluded by urging that the Board give consideration to the equities of his case. He urged that no one but the Forest Service will be affected by his amendment and that he has no interest in the Indian ruins on the property and would gladly exchange them.

By order dated December 1, 1980, the Board vacated the August 5 BLM decision and remanded the case for consideration of the new description. On March 4, 1981, BLM again rejected the Williams' application stating that it, as well as the Forest Service, had examined all pertinent public records and found no evidence to indicate that the legal

description in Bailey's patent was in error or that Bailey ever questioned boundaries of his homestead as described in the patent. The BLM decision continued:

> Mr. Bailey apparently recognized the need to use additional acreage beyond that which he had filed application for homestead patent. Instead Mr. Bailey obtained a Special Land Use Permit for 36 acres on April 9, 1908, prior to the allowance of Homestead Entry Phoenix 0177 on July 20, 1908. From the records of the Forest Service District Ranger, the permit was issued for lands lying south and east of the homestead property.
>
> However, there is no record of Mr. Bailey nor his successor, W. R. Pope, making application for an additional homestead to include the cultivated land lying adjacent to the Bailey homestead.
>
> While Mr. Bailey apparently did not question the boundaries of his homestead during his lifetime, the administrator of his estate did and an investigation was conducted by the Forest Service to determine if a discrepancy existed. In a letter dated November 1, 1940, addressed to a Mr. O. E. Searson, the Forest Service wrote:
>
> > We are of the opinion that there is some government land adjoining the Bailey ranch which has been cultivated. If there is a clear showing of agriculture value on some of this adjacent land it may be possible to secure a supplemental listing under the homestead laws.
> >
> > If you desire to apply for additional acreage we will examine the area and submit a report with our recommendations to the Regional Forest . . .
>
> On June 10, 1943, the District Forest Ranger issued a special land use permit to W. R. Pope which included the following:
>
> > 3. Location, and status of land affect:
> >
> > The fence line begins at a point 20 chains E. and 12.5 chains S. of the 1/4 corner common to Sections 21 and 22, T. 11 N., R. 18 E.; thence due W. 5 ch., then due S. 15 ch., S. 80 degrees E. 9 ch., S. 5 degrees E. 10 ch., S. 76 degrees E. 2 ch., S. 1 degree E. 30.75 ch., N. 2 degrees E. 7.5 ch., N. 16 degrees E. 7.5 ch., N. 10 degrees E. 8 ch., N. 60 degrees W. to boundary of patented land.

This is an old fence formerly under permit to George Bailey.

4. Character of land:

The land is open and has been under permit since 1908.

It is apparent from the above that the 55 acre permit obtained by W. R. Pope encompassed the 36 acre permit obtained by George Bailey.

The case file does not contain any evidence that the Williams have produced any proof that George Bailey, his estate or W. R. Pope, his successor, applied for any lands other than those far [sic] which he submitted final proof of entry.

The Forest Service maintains that by his own admission, Mr. Williams recognized that it was a recent BLM survey that defined the on-the-ground location of the homestead and not whether the original entryman (George Bailey) erred in describing his entry.
* * *

Even if the monumentation was accepted as the true south boundary of the original homestead entry, the 2-1/4 acre cultivated land lying along the south boundary was recognized by the Appellants and their predessors [sic] as well outside their private land boundary. This was definitely established in 1943 when Mr. Pope accepted a special land use permit for the cultivated land and pasture adjoining the patented homestead.

* * * * * * *

* * * From the evidence available, the Appellants have not made a clear showing that an error was made.

Ben Williams has appealed this decision. In his statement of reason now before the Board, appellant reiterates that the land described in the patent does not reflect the land actually settled by Bailey. He urges that neither BLM nor Forest Service has examined his evidence on the land and requests that a hearing be held at the site.

[1] In George Val Snow, 46 IBLA 101, 104 (1980), we observed that section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1976), provides that the Secretary may correct patents, thereby investing him (and those who are delegated to act for him) with discretion in the matter. Before such discretion can be exercised it must clearly appear that an error was, in fact, made. Otherwise, an application to amend would be barred as a matter of law.

Once the fact of error in the patent is established, the other circumstances of the case must be examined to determine whether considerations of equity and justice warrant amendment of the patent. In the instant case, we have examined the record and find it consistent with BLM's conclusions. There is insufficient evidence to support a finding either that Bailey thought that any error had been made or that he unknowingly misdescribed his homestead.

There is no doubt that Bailey and Pope had a need to and did use more land than the patented acreage. The record of the patent proceedings indicates that Bailey desired to obtain an additional 100 acres of land, but his patent application only described the 60 acres finally approved. As appellant is aware, both Bailey and Pope obtained special use permits for acreage adjoining the homestead. The difference in the amount of acreage in the permits may be simply explained by the observation that Bailey's permit covered lands to the east and south of the patented land but Pope's permit encompassed lands to the west of the homestead as well as the east and south. Appellant's assertion that the acreage difference reflects that Bailey entered lands different from those described in the patent is not sufficiently supported by the record. We note as well that appellant's map, on which he plotted the boundaries of Pope's permit acreage (Exh. A to Statement of Reasons dated October 31, 1980) in relation to the patented acreage, is in error. The fence line, when accurately plotted, does not fall within any of the patented land as placed by the dependent resurvey; rather, it runs from and back to the homestead boundaries.

Appellant has placed significant weight on his observation that the character of the land under the dependent resurvey is markedly different from that described in the 1914 field report supporting patent issuance. He claims that the dependent resurvey has reduced the 50 acres described as "tillable" in the 1914 report to 30 acres, but he has not substantiated his assertion that 30 acres are now gravelly ridge. At the same time, by affidavit, several witnesses have asserted that Bailey fenced and used more than the 30 acres of meadowlands now included in the patent.

A close examination of the field report and other patent records is necessary to explain this alleged discrepancy. The field report actually described the Bailey land as follows:

> 3. TOPOGRAPHY AND SURFACE. Tract is a small draw draining into Willow Wash. Principally open park with soil deep and fertile. 5 to 10 acres of gravelly ridges extend into tract. Altitude approximately 6800 ft. Slopes to the center with a general slope to the North East. Direct exposure. Approximately 50 acres are suitable for tilling when cleared. [Emphasis added.]

The land which Bailey entered did not, as appellant and his witnesses suggest, encompass simply 5 to 10 acres of ridge and the meadows. Rather, the field report confirms that there were "[a]pproximately

20 acres of timberland" which would be suitable for tilling once the timber had been cleared from it (Field Report at 4). Thus, Bailey actually claimed approximately 10 acres of the ridge, 20 acres of timberland, and the 30 acres of meadow that appellant now finds himself with. Between the timberland and meadow, 50 acres were considered tillable. The field report also states that Bailey had cleared some of the timber and that some of the "land where timber stood has been cultivated with the same success as the open land" (Field Report at 5). This finding corresponds to Bailey's assertion in his final proof that he regularly reserved 20 acres of his homestead for hay and 20 acres for cultivation of other crops; that is, the 30 acres of meadow plus the cleared timberland.

We do not doubt that, through the years, Bailey as well as Pope did use and fence more than 30 acres of meadow as claimed by appellant's witnesses. They both held special use permits from the Forest Service that allowed them to do so. While it may also be true that Bailey recognized that the ridge was not cultivable, it appears that he did choose to include it in his homestead.

Finally there is nothing in the original record that refers to the corner markers of the Bailey homestead, and appellant has not supplied evidence substantiating his assertion that the corner marker he has found is an original marker.

The allowance of a request for a hearing to present evidence on a question of fact is discretionary with this Board. 43 CFR 4.415. Unsubstantiated assertions that the facts are not what the evidence in the record supports do not constitute a sufficient offer of proof to warrant that a hearing be held. Amendment of a patent is an extraordinary action, and one who seeks to do so must establish that error did occur. Appellant has now had several opportunities to substantiate his claims but has not done so. His request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Arizona State Office is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge